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Title: Powertech USA, Inc.

Docket Number: 40-9075-MLA

ASLBP Number: 10-898-02-MLA-BD01

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1 UNITED STATES OF AMERICA

2 NUCLEAR REGULATORY COMMISSION

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4 ATOMIC SAFETY AND LICENSING BOARD PANEL

5 + + + + +

6 HEARING

7 -----x

8 In the Matter of: : Docket No.

9 POWERTECH USA, INC. : 40-9075-MLA

10 (Dewey-Burdock : ASLBP No.

11 In Situ Uranium : 10-898-02-MLA-BD01

12 Recovery Facility) :

13 -----x

14 Friday, February 23, 2018

15
16 Teleconference17
18 BEFORE:

19 WILLIAM J. FROEHLICH, Chair

20 DR. MARK O. BARNETT, Administrative Judge

21 G. PAUL BOLLWERK, III, Administrative Judge

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P-R-O-C-E-E-D-I-N-G-S

(3:00 p.m.)

CHAIR FROEHLICH: Good afternoon, all.
It's 3:00 p.m. Eastern Time.

This is Judge Froehlich in Rockville, Maryland, and with me is Judge Bollwerk. And on the telephone line is Judge Barnett. Also with me here in Rockville are Lindsay Simmons and Sarah Ladin, our law clerks who have been helpful in setting up today's teleconference.

This is a telephone status conference in the matter of Powertech USA, Inc., Docket Number 40-9075-MLA, concerning the Dewey-Burdock in situ Uranium Mining Facility.

Public notice scheduling this telephone conference was issued on February 14, 2018, and provision is made -- has been made for a bridge line for the parties to this case and for a public listen-only line for interested members of the public.

At this time, I'd like to take the appearances of the parties to the proceeding. Is the Licensee, Powertech, and its counsel online?

MR. PUGSLEY: Christopher Pugsley, Judge Froehlich, for Powertech.

MR. THOMPSON: Tony Thompson for

1 Powertech.

2 CHAIR FROEHLICH: Thank you, gentlemen.

3 And for our Intervenor, the Oglala Sioux
4 Tribe?

5 MR. PARSONS: Thank you, Your Honor. Jeff
6 Parsons on behalf of the Oglala Sioux Tribe.

7 MR. STILLIS: And Travis Stills on behalf
8 of the Oglala Sioux Tribe. Good morning.

9 CHAIR FROEHLICH: Thank you, gentlemen.

10 And for the Consolidated Intervenors, do
11 we have counsel online?

12 MR. FRANKEL: Yes, Your Honor. David
13 Frankel here for Consolidated Intervenors.

14 MR. BALLANCO: Good afternoon, Your Honor.
15 Tom Ballanco for Consolidated Intervenors.

16 CHAIR FROEHLICH: Thank you so much.

17 And for the Commission Staff?

18 MS. MONTEITH: Emily Monteith for the NRC
19 Staff calling from Chicago, Illinois. With me is
20 David Cylkowski calling in from headquarters, and one
21 member of the staff, Deanna Diaz-Toro called in on the
22 listen-only line.

23 CHAIR FROEHLICH: Thank you very much, Ms.
24 Monteith.

25 Thank you, all. As we proceed through

1 this call, if the parties have identified themselves
2 before they speak it will make things easier for our
3 court reporter and we'll have a better record of this
4 conference call.

5 Thus far, we have held three telephone
6 status conference calls with the parties, the last of
7 which was on January 24, 2018. The parties have been
8 discussing a December 2017 proposal by the NRC staff
9 for resolving Contention 1A.

10 The parties have also held a call among
11 counsel on February 1, 2018, to discuss further the
12 December 2017 NRC staff proposal or alternatives to
13 it, and to determine whether there were any aspects of
14 that December 2017 proposal upon which all parties
15 could agree.

16 Following the call among counsel, the
17 parties submitted a status report to the Board on
18 February 6th and later submitted answers to follow-up
19 questions from the Board and the NRC staff on February
20 15th.

21 At this point, it appears that the onus is
22 squarely on the NRC staff to decide how to move
23 forward and resolve the sole remaining contention in
24 this case. LBP-15-16 issued April 30, 2015, and LBP
25 17-09 issued October 19, 2017, resolved all but one

1 contention in this proceeding. All that remains is
2 Contention 1A.

3 The NRC staff has an obligation under the
4 -- under NEPA to assess the impact of the Dewey-
5 Burdock ISL project on tribal cultural resources
6 currently absent in the FSEIS by any reasonable method
7 of its choosing. It is the NRC staff's responsibility
8 to weigh its options, choose a reasonable method of
9 satisfying NEPA, and move forward.

10 On this front, the Board applauds the NRC
11 staff's December 2017 proposal, its use of
12 communications with the parties, and its continuing
13 efforts to move this outstanding contention forward
14 towards final resolution.

15 At this junction, resolution of Contention
16 1A depends on the staff selecting an appropriate
17 approach for addressing the FSEIS deficiencies.

18 I'd like to start today's conference call
19 with just a few questions for the Commission staff,
20 and I'd ask the other parties to -- to hold their
21 comments until we go through our questions of the NRC
22 staff.

23 So I guess, Ms. Monteith, I'd start with
24 you and ask how you would assess the progress, based
25 on your discussions and the correspondence among the

1 parties, towards settling on a formal proposal for
2 resolving Contention 1A.

3 MS. MONTEITH: Thank you, Your Honor. As
4 you noted, we have been engaged with the other parties
5 after we received their input in January 2018 on the
6 staff's December proposal.

7 It was indicated by counsel with Powertech
8 that they wished to have a teleconference to sort of
9 discuss this, and so the parties -- counsel for the
10 parties convened and then discussed the proposal and
11 other items that are reflected I believe in our status
12 report of February 6th.

13 We received input that we had requested on
14 February 15th, so now we are in a position I believe
15 to consider the input and move forward towards a final
16 decision on a methodology. So we are actively engaged
17 in that at the moment. The staff will apprise the
18 Board and parties of its decision as soon as possible.

19 CHAIR FROEHLICH: Does the staff have
20 internal deadlines among itself for coming to a
21 conclusion -- coming to a path forward?

22 MS. MONTEITH: We -- as our preliminary
23 timeframe noted, the staff intended to share a final
24 methodology with the parties by this month. The
25 timeframe was predicated on receiving the information

1 the staff requested of the parties for no later than
2 January 8, 2018, with engagement of the details on
3 this prior to that time, rather than what ultimately
4 occurred which is to have the parties seeking to
5 discuss the proposal and provide the requested
6 information well into February.

7 So our timeframe, as indicated in the
8 preliminary timeframe, was the December 2017 proposal.
9 It's aspirational, but we do not know whether we will
10 be able to provide that information regarding the
11 final proposal by the end of this month.

12 Our internal deadlines, we don't have
13 anything firmly set, but we need to make this decision
14 at an appropriate level of management, so we're moving
15 as quickly as possible towards that.

16 CHAIR FROEHLICH: Okay. Thank you.

17 ADMIN. JUDGE BOLLWERK: So do you think
18 we're going to hear -- this is Judge Bollwerk. Are we
19 going to hear anything in March?

20 MS. MONTEITH: I would hope so, Your
21 Honor.

22 ADMIN. JUDGE BOLLWERK: Okay.

23 CHAIR FROEHLICH: All right. Ms.
24 Monteith, are there -- is there additional information
25 that the staff is requesting of the parties or any

1 additional schedules or materials that it's waiting
2 for from the parties? Or do you have the information,
3 you know, from -- from those parties so that you can
4 go forward and make -- make your decision, hopefully
5 by March?

6 MS. MONTEITH: The plan is to move forward
7 with the information we have in our possession. The
8 last bit of information we were promised we would
9 receive was provided to us on the 15th. And we do not
10 anticipate seeking further information from the
11 parties. If that changes, we will of course inform
12 the parties of that fact.

13 CHAIR FROEHLICH: Okay. I have reviewed
14 the materials that were contained in the February 15th
15 response from the staff, and I had just one question
16 about how the figures in the text of the February 15th
17 staff's letter correspond with footnote 2.

18 In the text of the February 15th letter,
19 it says that the NRC staff estimates that during the
20 same period the NRC has recovered \$105,370.25 in
21 10 CFR Part 171 annual fees for NRC staff hours
22 associated with this licensing action.

23 It cites, then, to a footnote, footnote 2,
24 which says, "Because Powertech has not yet completed
25 construction and begun -- begun operations, it is not

1 yet part of the fee class subject to annual fees under
2 10 CFR Part 171."

3 Could you explain to me what these -- what
4 the sentence in the text means or says via-a-vis
5 footnote 2?

6 MR. CYLKOWSKI: Yes, Your Honor. This is
7 David Cylkowski for the staff.

8 CHAIR FROEHLICH: Thank you.

9 MR. CYLKOWSKI: Yes. So the -- in terms
10 of this representation was to list the fees or list
11 the costs for the staff's work that have been
12 recovered under 10 CFR Part 171, the annual fees to
13 the fee class, and then the footnote is intended to
14 just clarify that these fees were not -- these fees
15 were not recovered from Powertech or a portion of
16 these fees were not recovered from Powertech because
17 Powertech is not part of the fee class.

18 CHAIR FROEHLICH: Okay. Okay. All right.
19 So the Powertech portion of that \$105,000 figure is
20 zero at that point in time. Is that right, Mr.
21 Cylkowski?

22 MR. CYLKOWSKI: Yes, Your Honor. That is
23 my understanding.

24 CHAIR FROEHLICH: Okay.

25 MR. CYLKOWSKI: And if I confirm with the

1 -- with the staff now, if I get a different answer, I
2 will let you know. But I am getting confirmation that
3 that is correct.

4 CHAIR FROEHLICH: Okay. And thank you.
5 All right.

6 Any other questions, Judge Bollwerk, at
7 this point for the staff?

8 ADMIN. JUDGE BOLLWERK: No.

9 CHAIR FROEHLICH: Thank you. Judge
10 Barnett, do you have anything of -- of the Commission
11 staff?

12 ADMIN. JUDGE BARNETT: No.

13 CHAIR FROEHLICH: Okay. All right. I
14 guess this will be relatively brief. I would like to
15 hear from the parties if they have anything they wish
16 to state for -- for the Board as part of this status
17 -- status call conference. For the Oglala Sioux
18 Tribe?

19 MR. PARSONS: Thank you, Your Honor. This
20 is Jeff Parsons on behalf of the Tribe. We appreciate
21 certainly the Board's efforts in trying to bring this
22 to -- to an understanding amongst the parties. We're
23 certainly disappointed that we spent time trying to
24 negotiate particulars of a survey approach, and we
25 defined that the applicant wasn't willing to negotiate

1 on any aspect of those approaches as it appears to us.

2 We do -- I think it's worth nothing that
3 as the NRC staff moves forward to -- which is their
4 prerogative, to decide how to go forward to meet their
5 NEPA responsibilities, the Tribe would ask that the
6 NRC staff remember that there is a trust
7 responsibility in place, as well as the National
8 Historic Preservation Act, which requires ongoing
9 consultation where there are, you know, new decisions
10 that are undertaken by the staff.

11 And we're certainly interested in engaging
12 on additional discussions with them to help that --
13 any proposals that differ from the one that we found
14 acceptable, and we're really hoping to move forward
15 with -- from December.

16 CHAIR FROEHLICH: I hope you will continue
17 your efforts to work with the staff and make -- make
18 -- do all that you can to make sure that all of the
19 parties that are I guess identified by the staff and
20 are necessary to the staff proposal are available and
21 responsive to the staff's request.

22 MR. PARSONS: Thank you, Your Honor. We
23 -- the Tribe has made that commitment, and we intend
24 to stick to it.

25 ADMIN. JUDGE BOLLWERK: This is Judge

1 Bollwerk. I think -- I think what he said basically
2 is that when the train pulls out of the station,
3 hopefully everybody is going to be on board. And,
4 unfortunately, perhaps those that aren't are going to
5 get left behind, but it sounds like you're doing your
6 best efforts to get everyone on the train as it were.
7 So --

8 MR. PARSONS: Thank you, Your Honor.

9 CHAIR FROEHLICH: All right. Do the
10 Consolidated Intervenors have anything they wish to
11 state at this status conference call?

12 MR. FRANKEL: David Frankel for
13 Consolidated Intervenors. We echo the Tribe's
14 frustration with having us spend time on something
15 that was -- appears to us to have been destined to
16 fail from the outset. We don't believe that Powertech
17 is negotiating at this point in good faith.

18 Thank you, Your Honor.

19 CHAIR FROEHLICH: All right. Mr. Pugsley
20 or Mr. Thompson, any response or comments you wish to
21 make at this time?

22 MR. PUGSLEY: Judge Froehlich, Chris
23 Pugsley for Powertech. First, to correct Mr. Parsons,
24 Powertech is not an applicant. It is the licensee.

25 Second, I think it is important to note

1 that we have actively pursued an option under the
2 National Environmental Policy Act, not the National
3 Historic Preservation Act, of whose contention has
4 been deemed closed and does not appeal to the
5 Commission.

6 We believe that NRC staff can profit from
7 what we have offered in our January 19, 2018,
8 submission. We have received confirmation in written
9 correspondence from the staff that they are
10 considering the parameters we have proposed.

11 We also believe that if there are concerns
12 about ongoing NHPA commitments, we have a detailed
13 programmatic agreement in place that the Oglala Sioux
14 Tribe and other tribes are of course welcome to
15 participate in and to identify items that -- historic
16 and cultural resources that can be considered for
17 evaluation.

18 We believe our proposal of January 19,
19 2018, will also provide significant additional
20 information from a highly qualified contractor who can
21 provide this information for review and can also
22 provide an opportunity for those parties choosing to
23 participate in the implementation of the programmatic
24 agreement with an opportunity to see if there are
25 resources that need to be identified and evaluated

1 and, if necessary, dealt with under the appropriate
2 provisions of the programmatic agreement.

3 I would say that I take offense to the
4 statement that Powertech is not dealing in good faith.
5 We have answered the questions posed to us by the
6 Board and the staff. We have offered what we believe
7 is a reasonable counter-proposal to what NRC staff has
8 offered under NEPA, which is not a government-to-
9 government statute. And we think that -- that our
10 proposal, while under consideration by the staff,
11 should be seriously looked at as a viable option.

12 Thank you.

13 CHAIR FROEHLICH: Thank you.

14 MR. PARSONS: Your Honor, this is Jeff
15 Parsons. If I may, one -- one comment caught my ear
16 with Mr. Pugsley indicating that he had received
17 communication from NRC staff that NRC staff is
18 considering the parameters that they -- that Powertech
19 has laid out.

20 Am I to understand that there are
21 communications that have undertaken -- been undertaken
22 between NRC staff and Powertech that have not yet been
23 disclosed on the record?

24 MS. MONTEITH: Your Honor, Emily Monteith
25 for the NRC staff, if I may respond to Mr. Parsons.

1 In response to the licensee's input that they provided
2 in January, they requested a response from the NRC
3 staff within a certain timeframe.

4 So the staff sent a letter acknowledging
5 the input that they provided and indicated that we
6 were -- in light of the additional information
7 received by Powertech, and from the Consolidated
8 Intervenors and the Tribe, we are considering all of
9 that input and deciding how to move forward.

10 That will, in accordance with our
11 mandatory disclosure obligations, be released in the
12 next few days.

13 MR. PARSONS: Thank you, Ms. Monteith.
14 This is Jeff Parsons again. I certainly appreciate
15 that, but it would seem to me that the -- in the midst
16 of negotiations and communications between the
17 parties, including the Tribe and its counsel, as has
18 been an issue in this case in the past, we would
19 stress again that we would ask you to make us aware of
20 those communications at the earliest possible time,
21 please.

22 ADMIN. JUDGE BOLLWERK: Ms. Monteith, this
23 is Judge Bollwerk. Do you think you could just simply
24 send a copy of that or an ML, the accession number, to
25 Mr. Parsons? I recognize it will be in your next

1 disclosure, but under the circumstances?

2 MS. MONTEITH: Yes, Your Honor, I can.

3 ADMIN. JUDGE BOLLWERK: Thank you very
4 much.

5 CHAIR FROEHLICH: Okay.

6 ADMIN. JUDGE BOLLWERK: So I just had a
7 couple of questions for the staff. This is Judge
8 Bollwerk again. In light of some of the
9 correspondence that we have been -- we have been given
10 over the past couple weeks, it seems like there are
11 some statements from Powertech about looking to the
12 staff for assurances and guarantees. Is that
13 something the staff normally does in the process of a
14 licensing process?

15 MS. MONTEITH: Is that a question for the
16 staff, Your Honor?

17 ADMIN. JUDGE BOLLWERK: Yes. I'm sorry.

18 MS. MONTEITH: Your Honor, I'm not aware
19 of that ever being the case in a legal proceeding such
20 as this, in my experience.

21 ADMIN. JUDGE BOLLWERK: So the licensing
22 process sort of goes where the licensing process goes,
23 as does the adjudicatory process.

24 MS. MONTEITH: I'm not sure I understand.
25 The distinction here, I don't think there is one. We

1 -- we are litigating a NEPA contention. As the Board
2 has identified, it is our obligation to identify a
3 reasonable methodology to satisfy the deficiencies
4 identified by the Board.

5 So we are to arrive at the best method --
6 methodology that the staff can support, and this Board
7 has asked. After that, it is in the hands of the
8 Board, I believe, to determine whether we have
9 satisfied NEPA.

10 ADMIN. JUDGE BOLLWERK: And then in terms
11 of the process -- you know, we're talking about the
12 licensing process as opposed to the adjudicatory
13 process -- what does -- how does the staff handle
14 input from an applicant or a licensee, frankly, about
15 the costs of what they're going to be billed or are
16 going to be responsible for as the licensing process
17 goes on?

18 Do you give them updates, or do you give
19 them sort of a heads-up about what things are going
20 on, or are they basically responsible when you need to
21 bill them that they -- they pay up?

22 MS. MONTEITH: Well, that's a question I'm
23 not sure I -- I'm qualified to answer at this point.
24 I would have to confer with the staff as to how they
25 interact with the licensee on the minutiae of billing.

1 I'm not personally aware of circumstances
2 where we have -- well, I can't actually relate too
3 much about it, Your Honor. I'm afraid that's a fairly
4 delicate internal question we'd have to contend with.

5 ADMIN. JUDGE BOLLWERK: Okay.

6 CHAIR FROEHLICH: Ms. Monteith, I guess
7 I'd like to just follow up on what Judge Bollwerk
8 asked. This is Judge Froehlich. When the staff meets
9 or confers with an applicant or licensee, are they
10 given like guarantees of the pace at which the staff
11 will address the issues that arise in that
12 application?

13 Or are they given a cost estimate or like
14 a price tag not to exceed a certain amount for that
15 application or license? Is that part of the process
16 I guess when an applicant comes -- comes to the staff
17 or a licensee is using the process to get the license
18 or to perfect the license after a hearing?

19 MS. MONTEITH: Again, Your Honor, that's
20 such a broad question, I -- I just -- I'm not sure I
21 could even do it justice. It's a swath of a variety
22 of licensees and interactions and licensing actions
23 that this agency takes. I can't -- I can't simply
24 speak for the staff as a whole in that case. With
25 respect to Powertech, I was also not involved very

1 much with the licensing process here.

2 CHAIR FROEHLICH: All right.

3 MR. PUGSLEY: Judge Bollwerk, this is
4 Chris Pugsley for Powertech. If I may offer some
5 input, please. Mr. Thompson and I have been involved
6 in the six licenses in one way or another that have
7 been issued since release of NUREG-1910 for the
8 generic environmental impact statement for in situ
9 recovery licensees, of which one of the supplements to
10 that is Powertech's FSEIS.

11 And our experience has been that as much
12 as we would like to help our clients find out a range
13 of cost estimates for completion of the NEPA processes
14 associated with these licenses, NRC has never been in
15 a position to provide us with a hard-and-fast
16 estimate, let alone a range.

17 Our experience has been that the costs
18 have always been incrementally higher than what could
19 even be estimated. And in many cases -- and part of
20 the reasons that the National Mining Association and
21 other companies have supported NRC's -- what is on the
22 record with the Commission right now in terms of a
23 pilot program to try to figure out if there can be six
24 fee programs associated with NEPA reviews for FSEISs
25 or EAs or things of that nature for uranium recovery

1 facilities; hence, the reason for that pilot program.
2 There is no certainty available as we -- as both of
3 our experiences indicate of what things would cost.

4 ADMIN. JUDGE BOLLWERK: Mr. Pugsley, can
5 I just follow up on your answer? I guess there's no
6 certainty as to fees. When an applicant or the six
7 licensees that you represent meet with the staff, are
8 they given guarantees as to the timeframe or, you
9 know, or anything like that from the staff?

10 MR. PUGSLEY: Judge Bollwerk, Chris
11 Pugsley again. No, they are not in a position to give
12 us timeframes because there are often issues
13 associated with resources, given that the NRC is a
14 90 percent fee recovery agency under the Omnibus
15 Budget Reconciliation Act of 1990, I believe is the
16 year. And Mr. Thompson can correct me if I'm wrong,
17 but I believe that that is the reason that we cannot
18 nail down timeframes, as much as we would like to know
19 those, because many of the companies that we represent
20 are junior companies that burn investment capital and
21 do not necessarily have active cash flow.

22 Seeking timelines, milestones, and fixed
23 budget estimates, we have not been able to do that.
24 And it's no fault of NRC's. We certainly do not lay
25 blame on them for that, but at the same time we aren't

1 able to have that information. And, hence, part of
2 the problem with -- which was identified in Powertech
3 submissions, that there are no -- we have no
4 milestones, we have no fixed cost estimates, and as
5 you -- as was said earlier, no not-to-exceed numbers.

6 So that's just based on past experience
7 through the last six licenses that were issued by NRC
8 for in situ recovery facilities.

9 ADMIN. JUDGE BOLLWERK: Thank you, Mr.
10 Pugsley.

11 CHAIR FROEHLICH: I have nothing further
12 at this point. I would hope that we will hear from
13 the NRC staff in March or sooner, and I would propose
14 that we have a fifth status conference call towards
15 the end of March where hopefully we'll know how the --
16 how the staff intends to move forward and the
17 timetable upon which they will proceed.

18 ADMIN. JUDGE BOLLWERK: This is Judge
19 Bollwerk. Ms. Monteith, do you think -- in mid-March
20 or late March?

21 MS. MONTEITH: Your Honor, I just don't
22 want to give you a date if I can't get to it. We --
23 I can commit to the truth, in fact, that we are
24 working through this as quickly as possible. This is
25 a top priority. So --

1 ADMIN. JUDGE BOLLWERK: I understand.

2 MS. MONTEITH: -- as demonstrated in
3 December, we -- we aim to get this done with as
4 quickly as possible, and I think we still have -- are
5 of that mind.

6 ADMIN. JUDGE BOLLWERK: I mean, you made
7 us very aware of the fact that there is a -- there is
8 not only questions of -- well, there are a number of
9 questions, but one of them is about how to get this
10 done in a timeframe that allows you to finish it up
11 promptly. So obviously -- you obviously understand
12 that, so --

13 MS. MONTEITH: Yes, Your Honor.

14 ADMIN. JUDGE BOLLWERK: -- we'll hear from
15 you.

16 CHAIR FROEHLICH: All right. Judge
17 Barnett, do you have anything of -- any questions or
18 any comments for the parties?

19 ADMIN. JUDGE BARNETT: No.

20 CHAIR FROEHLICH: Okay. Judge Bollwerk?

21 ADMIN. JUDGE BOLLWERK: I think I've
22 caused enough trouble today. Thank you.

23 CHAIR FROEHLICH: All right. I'd like to
24 thank all of the parties for the update and for this
25 status call. We look forward to seeing the report or

1 letter from -- from the staff indicating its path
2 forward and timetable for that and would anticipate a
3 further status call in March.

4 If there is nothing from any of the
5 parties, this status call conference is concluded.
6 Thank you, all.

7 (Whereupon, the above-entitled matter went
8 off the record at 3:27 p.m.)
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